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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. GEORGE BROOKS, Defendant and Appellant.	C035609 (Super. Ct. No. SF077501A)

A jury convicted defendant George Brooks of vehicular burglary (Pen. Code, § 459; undesignated section references are to the Penal Code) and receiving stolen property (§ 496, subd. (a)). In bifurcated proceedings, the trial court found true six prior prison terms (§ 667.5, subd. (b)) and a strike prior (§§ 667, subds. (b)-(i), 1170.12).

The court sentenced defendant to state prison for an aggregate term of seven years [upper term of three years for vehicular burglary, doubled for the strike prior, a concurrent three-year term, doubled, for receiving stolen property, one

year for one prior prison term, and the other prior prison term enhancements were stricken for sentencing purposes only].

Defendant appeals. He contends (1) insufficient evidence supports his conviction for vehicular burglary, (2) section 654 applies to his sentence for receiving stolen property, and (3) the trial court erroneously instructed the jury in the language of CALJIC No. 17.41.1. We shall modify the sentence to provide for a stay pursuant to section 654 of the sentence for receiving stolen property and otherwise affirm the judgment.

FACTS

While on patrol about 1:30 a.m. on July 21, 1999, Paulino Vivero, a patrol driver at the Oakwood Apartments complex in Stockton, observed defendant standing next to the passenger door of a parked 1966 Ford Ranchero. The passenger door was open. Another person was lying across the seat. Vivero saw movement between defendant and the person inside the Ranchero. Vivero drove up to the Ranchero, got out of his patrol car and approached defendant. Defendant looked at Vivero and started walking in the opposite direction and kept walking despite Vivero's repeated orders to stop. Vivero also asked defendant as he walked away why he had a car speaker in his hand. Defendant did not answer. P.B., defendant's 16-year-old nephew, who was in the Ranchero, was taken into custody.

While another security officer detained P.B. for the police, Vivero searched for defendant and found him on a nearby street carrying the speaker. Defendant also had a bulge in the front of his clothing. Vivero watched defendant walk towards a

house, remain out of sight for a minute, and then return empty-handed. When Vivero ordered defendant to stop and asked about the speaker, defendant responded that he had not done anything. Defendant opened his jacket and showed he had nothing. Defendant asked whether Vivero would let him leave if he returned the speaker. Vivero replied that it was between defendant and the police. Vivero demanded identification but defendant claimed he had none. Defendant walked towards the house and returned with the speaker which he set down on the ground saying, "Here, man, can I go?" Defendant then handed to Vivero a wallet containing the identification of Jerry Brown who owned the Ranchero. After police arrived and arrested defendant, Vivero went to the house and found a stereo and a CD hidden in the bushes.

The evening before the burglary, Brown had left his wallet containing about $80 in the glove box of the Ranchero. When he parked the Ranchero, he rolled up the windows, attached a locking bar from the steering wheel to the brake pedal, and locked the doors. The next morning, Brown found part of the bar on the ground next to the Ranchero, one door was unlocked and the stereo, speakers, his wallet and cash were all missing.

P.B. testified at defendant's trial. P.B. claimed that he entered the unlocked vehicle, took the stereo, speakers and wallet, walked to the corner where defendant was talking to women, and asked defendant to hold the items for him without explaining where he obtained the items other than saying the

items belonged to his girlfriend. When P.B. reentered the car to take another piece of the stereo, Vivero detained him.

P.B. was impeached with two unrelated robberies. On two occasions, P.B. took bicycles by force or fear. P.B. denied telling an officer the night of his arrest that he and defendant had gone to steal speakers and that defendant accompanied him for the sole purpose of helping him if he got into trouble.

Defendant testified in his own defense. He went looking for P.B. because he had not come home. When defendant found P.B., he told P.B. it was time to go home. P.B. explained that he would as soon as he retrieved some items from his girlfriend. P.B. walked away and defendant stood at a corner talking to two women. P.B. returned and handed to defendant a speaker and a wallet. Defendant again told P.B. it was time to go home. P.B. said he would as soon as he retrieved the rest of his belongings. After finishing his conversation with the two women, defendant looked down the street and saw P.B. in a car. Defendant walked up to a tree to urinate and called to P.B. that it was time to go. Defendant denied that he was standing next to the car when Vivero drove up. Defendant walked away from Vivero because defendant had been urinating and he did not want to get caught exposing himself. Although he saw P.B. had been detained, defendant continued walking not wanting to interfere and be charged with obstructing justice. Defendant denied that P.B. solicited his help in burglarizing the Ranchero. Defendant denied knowing that the property he was holding for P.B. belonged to someone else.

In rebuttal, Stockton Police Officer Raquel Betti testified that she interviewed P.B. at juvenile hall on July 21, 1999. P.B. explained that he went to the area intending to break into cars, that his uncle, defendant, agreed to go with him, and that defendant said he would not help in the theft but would help P.B. get out of trouble if he ran into problems. P.B. then denied breaking into any cars although found in possession of a stereo face.

DISCUSSION

I

Defendant contends that insufficient evidence supports his conviction for vehicular burglary in that there was insufficient evidence of his specific intent to facilitate, promote or encourage P.B.'s burglary of the Ranchero. He cites the fact that he merely walked away rather than ran away and that Vivero did not hear defendant say anything to P.B. when Vivero approached in the patrol car. He claims this evidence was consistent with his testimony that he did not aid or advise P.B. and was merely a bystander. Defendant further cites P.B.'s and his own testimony that defendant provided no assistance. This contention is frivolous on this record; sufficient evidence supports defendant's conviction for vehicular burglary.

As applicable here, the elements of vehicular burglary are "[1. A person entered an automobile when the doors were locked; and] [¶] . . . [¶] 2. At the time of the entry, the person had the specific intent to steal, take, and carry away someone else's property and intended to deprive the owner permanently of

his or her property." (CALJIC No. 14.58; *In re Young K.* (1996) 49 Cal.App.4th 861, 863.)

"A person aids and abets the [commission] . . . of a crime when he or she, [¶] 1. With knowledge of the unlawful purpose of the perpetrator and [¶] 2. With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] 3. By act or advice aids, promotes, encourages or instigates the commission of the crime." (CALJIC No. 3.01; *People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

Knowledge and intent can be inferred from circumstantial evidence. (§ 21, subd. (a); *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245; *People v. Falck* (1997) 52 Cal.App.4th 287, 299; *People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495.)

An intent to facilitate the acts of the perpetrator may be formed "'*prior to or during* "commission" of that offense.' [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039; *People v. Beeman* (1984) 35 Cal.3d 547, 558-559.)

Defendant cites and then distinguishes *People v. Frye* (1985) 166 Cal.App.3d 941 (*Frye*) and *People v. Morga* (1969) 273 Cal.App.2d 200 (*Morga*).

In *Frye,* the defendant was convicted of residential burglary for aiding and abetting, that is, acting as a lookout. The defendant had been standing outside the home. When the police arrived, he ran to the back where he could warn the person inside the home. Arrested and searched, officers found a knife and flashlight on the defendant's person. (*Frye, supra,* 166 Cal.App.3d at pp. 945-948.)

In *Morga,* the defendant was convicted of residential burglary for aiding and abetting, that is, acting as the getaway driver and lookout. (*Morga, supra,* 273 Cal.App.2d at pp. 201, 203, 208.)

Unlike the defendant in *Frye,* defendant argues he had no burglary tools, merely walked away, and did not warn P.B. Unlike the defendant in *Morga,* defendant argues he did not transport P.B. to the scene. Other evidence supports the jury's conclusion that defendant encouraged and facilitated the offense.

Viewing the evidence in the light most favorable to the judgment (*People v. Johnson* (1980) 26 Cal.3d 557, 576; accord, *People v. Memro* (1995) 11 Cal.4th 786, 861), defendant was seen standing next to the open passenger door and P.B., defendant's 16-year-old nephew, was lying on the seat of the Ranchero. The security guard saw some unidentified item pass between the two ["I saw movement. I didn't see actually, you know, the stuff, but I seen, you know, movement of their hands. At that time, I couldn't tell what was happening, what they were taking out."]. When approached, defendant walked away carrying a car stereo speaker. Defendant also had a bulge in the front of his clothing. He refused to halt when ordered to do so and failed to answer when asked about the speaker. He carried the speaker to a location where other car stereo equipment was later found. He further demonstrated a consciousness of guilt by offering to return the speaker in exchange for the security guard letting defendant leave. The owner of the Ranchero testified that the

vehicle had been locked, a car club attached from the steering wheel to the brake pedal and the windows rolled up. P.B. told a detective at juvenile hall that he had planned to go to the park to steal items from cars and that defendant knew of his purpose.

Contrary to defendant's claim otherwise, the evidence raised more than a mere suspicion. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Further, despite defendant's protestations otherwise, he was not merely at the scene of a crime. (See *People v. Durham* (1969) 70 Cal.2d 171, 181; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409; *People v. Hill* (1946) 77 Cal.App.2d 287, 293.) His relationship with the perpetrator, his nephew, and his conduct during the offense (standing at the open passenger door, taking an item from P.B. and then walking away holding a car stereo speaker and obviously carrying other items under his clothes) and after the offense (walking away despite orders to stop and failing to answer the question why he had a car speaker in his hand which demonstrated a consciousness of guilt) show that he aided and abetted the offense. (See *People v. Campbell, supra,* 25 Cal.App.4th at p. 409; see also *People v. Bolin* (1998) 18 Cal.4th 297, 326; *People v. Turner* (1990) 50 Cal.3d 668, 695.)

Sufficient evidence supports defendant's conviction.

II

The court imposed the upper term of three years, doubled for the strike prior, for vehicular burglary and a concurrent three-year term, doubled, for receiving stolen property. The court reasoned that "the concealing in this case was separate

from the burglary situation. That is, there was a break between the burglary and the act of concealing the stereo, a separate act of conduct." Defendant contends the trial court erred in failing to stay the sentence on the receiving count pursuant to section 654. The Attorney General concedes that the trial court erred. We accept the concession.

Section 654 provides, in relevant part, as follows:

"(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; accord, *People v. Latimer* (1993) 5 Cal.4th 1203, 1216.)

The receipt and concealment of the property stolen from the Ranchero were with the same intent and objective of the vehicular burglary. (See *People v. Allen* (1999) 21 Cal.4th 846, 865-867; *People v. Carr* (1998) 66 Cal.App.4th 109, 114.)

The trial court erred in imposing a concurrent term and in failing to stay the sentence for receiving stolen property

pursuant to section 654. We shall modify the judgment accordingly.

III

Citing his state and federal constitutional right to a jury trial and freedom of speech, defendant contends the trial court committed prejudicial error in giving CALJIC No. 17.41.1. Specifically, he claims the instruction "exert[ed] a chilling effect on the deliberations." He asserts the instruction is "useless" and "a remedy in search of a nonexistent problem." The Attorney General responds that no error occurred and that in any event, defendant has failed to demonstrate prejudice. We conclude any error was harmless.

The trial court instructed the jury in the language of CALJIC No. 17.41.1 as follows:

"The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law, or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise this Court of the situation."

Currently the instruction is pending review before the California Supreme Court (*People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23, 2000, S088909; *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, S086462).

Recently, this court held that any error in instructing in the language of CALJIC No. 17.41.1 is not reversible per se but is subject to harmless error analysis under the standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1332, 1335-1336 (*Molina*).) Our Supreme Court denied review in *Molina* on November 29, 2000.

Defendant asserts that *Molina* is inapplicable in that he "does not argue that the challenged instruction infringed on any right to jury nullification, but rather that by exerting a chilling effect on the jury's free exchange of ideas during deliberations, the instruction denied him the right to a fair jury trial" as guaranteed by the state and federal constitutions. He argues it is "impossible to determine the extent to which [the instruction] may have stifled one or more of the jurors in maintaining an unpopular position or voting his or her conscience." Defendant is simply wrong. The defendant in *Molina* argued that the instruction "invites jurors in the majority to coerce holdout jurors into agreeing with the majority and intrudes into the deliberative process." (*Molina, supra,* 82 Cal.App.4th at p. 1335.)

Assuming CALJIC No. 17.41.1 should not have been given, any error was harmless beyond a reasonable doubt. (*Molina, supra,* 82 Cal.App.4th at pp. 1332, 1335-1336.) The jury deliberated about two hours [approximately 4:00 p.m. to 4:15 p.m. on March 16, 2000, then 9:30 a.m. to 11:05 a.m. on March 17, 2000] and there was no indication of any holdout jurors or a

deadlocked jury. The instruction simply had no effect whatsoever on the jury. We reject defendant's speculation that the instruction had the effect of chilling discussions. As we said in *Molina,* "There is no warrant for that view on this record." (*Id.* at p. 1336.)

DISPOSITION

The sentence for receiving stolen property is modified to provide for a stay pursuant to section 654. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections. As modified, the judgment is affirmed.

MORRISON, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.